

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

In re: §
A'GACI, L.L.C. § Case No. 19-51919-RBK
Debtor. § Chapter 11

EXPEDITED MOTION TO COMPROMISE AND SETTLE CLAIMS AGAINST SECOND AVENUE
PARTNERS PURSUANT TO BANKRUPTCY RULE 9019

TO THE HONORABLE H. RONALD B. KING, U. S. BANKRUPTCY JUDGE:

COMES NOW Randolph N. Osherow, the duly appointed Chapter 7 Trustee, by and through his attorney, and pursuant to Federal Rule of Bankruptcy Procedure 9019, files this *Trustee's Motion to Compromise and Settlement Claims With Second Avenue Partners Pursuant to Bankruptcy Rule 9019* (the "Motion"), and would respectfully show the Court as follows:

I
INTRODUCTION

1. The Chapter 7 Trustee seeks approval of and authority to enter into a settlement (the "Agreement") with Second Avenue Capital Partners ("Second Avenue") pursuant to Rule 9019. The proposed Agreement will result in prompt payment of substantial administrative liabilities of the estate and the immediate resolution of what is certain to be protracted and costly litigation. Accordingly, and as set forth herein, the Chapter 7 Trustee believes that the Agreement should be approved pursuant to Rule 9019.

II.
JURISDICTION

2. This Court has jurisdiction to consider this matter under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b).

3. Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.
4. Relief is sought pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

III.
BACKGROUND

5. This case was filed as a chapter 11 bankruptcy on August 7, 2019. Significant events occurred during the pendency of the Chapter 11 proceeding of which this Court is fully aware.

6. On October 4, 2019, the case was converted to chapter 7, at which time Randolph N. Osherow was appointed as Chapter 7 Trustee and continues to act in that capacity.

IV.
TERMS OF SETTLEMENT

7. The proposed Agreement resolves complicated and likely protracted litigation with Second Avenue, litigation in which a legal or financial success for the estate is far from certain. The Chapter 7 Trustee believes the Agreement is in the best interest of this chapter 7 estate. As will be more fully set forth in a form of order agreed to by the parties, the respective terms of the compromise are as follows:

Second Avenue will:

- a) Purchase the allowed claim of Hilco/SB360 and be subrogated to its right of distribution from the estate with the same priority as if the claim remained with Hilco/SB360.
- b) Purchase the asserted claim of SierraConstellation Partners and such claim shall be withdrawn and disallowed as to the Debtor.
- c) Purchase the allowed claims of Debtor's employees. Procedurally, Second Avenue shall fund the payment of such claims by delivering payment to the Trustee, of aggregate amount of \$374,799.63. Said payment shall be wired to the Trustee within fifteen (15) days after the date this Motion is approved by this Court. If the fifteenth day falls on a weekend or holiday, the funds shall be wired to the Trustee on the next business day after the fifteenth day. Second Avenue shall be subrogated to the right of distribution from the estate with the same priority as if the claims remained with the individual employees.
- d) Pay fifty percent (50%) of the allowed estate sales tax liability to the State of Texas, up to a maximum payment of \$200,000.00, with a right of subrogation with the same priority as if the claims remained with the State of Texas.
- e) Pay Simon Property Company \$50,000.00 on its allowed administrative claim with a "last-out" right of subrogation to any distribution from the estate with the same priority as if the total amount of the claim had remained with Simon Property Company.

f) The Trustee shall be allowed to keep the sum of \$11,193.92 from the cash collateral account previously held by JP Morgan Chase as account# 8570. The remaining sum of \$11,193.92 shall be delivered by the Trustee to Second Avenue on its secured claim.

The Trustee will:

- a) Assign to Second Avenue all of the Debtor's interest in the following property: i) claims against Visa and MasterCard asserted as part of a class action, ii) right to funds of any credit card account holdback, except to the funds discussed in subparagraph f) above; and iii) claim against Debtor's insurer relating to property and income loss arising from weather damage incurred by the Debtor in its Puerto Rico stores, including any records necessary to assert and prosecute such claims.
- b) Subject to its payment as required in subparagraph d) above, release Second Avenue of any claim owned by the estate and warrant to Second Avenue that any liability under the Adversary Proceeding filed by the State of Texas with respect to state sales tax shall be released. The estate shall pay 100% of any legal fees and expenses incurred by the estate to challenge the liability. In such event, the Trustee will maintain sufficient funds to pay the full potential amount of such sales tax liability.
- c) Release SierraConstellation Partners of any and all liability for both pre-petition and post-petition claims including but not limited to an avoidable preference under Section 547 of the Bankruptcy Code. In consideration therefor, SierraConstellation Partners shall make reasonable efforts to provide sufficient documentation to the Trustee to assist in the filing of a proof of claim by the Texas Attorney General for any sales tax liability. Subject to this Motion under Bankruptcy Rule 9019 being approved by this Court, SierraConstellation Partners shall withdraw *Application to Employ and Retain SierraConstellation Partners LLC as Financial Advisors to Debtor Pursuant to Section 327(a)* [Docket# 71].
- d) Release Simon Property Company from any liability for pre-petition conduct under the debtor's leases with Simon Property Company.
- e) Dismiss the pending "Motion to Reconsider" pending as docket # 168, with prejudice to refiling of same, the effect of which shall render the Final DIP Order, docket# 144 to become a final order and the Challenge period as that term is defined within Paragraph 36 of the DIP Order shall be deemed to have terminated.

V.
REQUESTED RELIEF

8. By this Motion, the Chapter 7 Trustee respectfully requests entry of an order pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure approving and authorizing him to enter into the Agreement and resolving the claims pursuant to the terms set forth herein. The Chapter 7 Trustee also requests that the order approving this settlement authorize him to execute such documents as he, in his judgment, deems necessary to effectuate the settlement, including but not limited to any settlement or release agreements that may be required to fully effectuate this settlement.

VI
GROUNDS FOR RELIEF

9. Rule 9019(a) of the Federal Rules of Bankruptcy Procedure provides in relevant part that on motion by a trustee and after notice and a hearing the court may approve a compromise or settlement. “Settlements and compromises are a normal part of the process of reorganization.” *Protective Comm. Four Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 428 (1968) (quoting *Case v. The Los Angeles Lumber Prod. Co.*, 308 U.S. 106, 130 (1939)).

10. The decision whether to approve a particular settlement lies within the discretion of the Bankruptcy Court. *American Can Co. v. Herpel*, (*In re: Jackson Brewing Co.*), 624 F.2d 605, 607 (5th Cir. 1980). “A reviewing court will uphold the approval of a settlement if it is the result of adequate and intelligent consideration of the merits of the claims, the difficulties of pursuing them, the potential harm to debtor’s estate caused by the delay, and the fairness of the terms of the settlement.” *TMT Trailer Ferry, Inc.*, 390 U.S. at 434.

11. The Fifth Circuit has held that in deciding whether to approve a settlement, courts should evaluate and set forth in comprehensive fashion:

- a. probability of success in the litigation, with due consideration for the uncertainty in fact and law;
- b. the complexity and likely duration of the litigation and any intended expenses, inconvenience, and delay; and
- c. all other facts bearing on the wisdom of the compromise.

In re Jackson Brewing Co., 624 F.2d at 607-08.

12. The Trustee believes that the proposed settlement is in the best interest of the Chapter 7 Estate because it results in a fair and equitable compromise after consideration of the aforementioned factors. Further, it resolves a multi-faceted legal dispute with Second Avenue, which could be both lengthy and costly, and it facilitates payment of certain claims. Additionally, the proposed settlement will benefit the Chapter 7 Estate through Second Avenue’s payment of a portion of the Sales Tax

Liability as set forth in the Settlement Agreement. Therefore, in the Trustee's assessment, this settlement results in significant savings to the Chapter 7 Estate and its creditors.

Probability of Success on the Merits:

13. This matter is contested by the parties. All parties and their respective counsel believe that they will prevail on the merits. The Trustee, in exercising his business judgment, believes that the proposed settlement will adequately compensate the estate and reduce the risk to the Chapter 7 Estate. Further, the Chapter 7 Estate has limited resources to fund any of the litigation. The Trustee prefers to allocate resources to the payment of claims rather than to fund speculative litigation that may not yield an economic benefit to the Chapter 7 Estate. The Trustee, having reviewed the matter, has determined that the risk of prevailing, as with all litigation, is questionable and the associated cost will redound to the detriment of the Chapter 7 Estate.

Other Factors:

14. In addition to contributing to the prompt administration of this Chapter 7 Estate, approval of and authority to enter into the Agreement allows the Trustee to pay claims more expeditiously than if the Trustee were required to fully litigate the lawsuits.

15. It is the sound business judgment of the Chapter 7 Trustee, after thorough consideration of the aforementioned factors, that the proposed settlement is in the best interest of this Chapter 7 Estate. The Trustee submits that the terms of the proposed Agreement fall within the reasonable range of litigation possibilities as set forth in *TMT Trailer Ferry, Inc, supra*.

Relief Requested:

16. In accordance with this Motion, the Chapter 7 Trustee seeks to compromise and settle claims between the parties as provided herein.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Randolph N. Osherow, Chapter 7 Trustee, respectfully requests that the Court grant this Motion to Settle and approve the proposed settlement under

the terms set forth herein and for such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that on the 27th day of November, 2019, a true and correct copy of the foregoing document was served upon the parties on the attached mailing matrix via first class mail and by electronic means as listed on the Court's ECF noticing system or by regular first class U. S. Mail.

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